

APPEAL NO. 041805
FILED SEPTEMBER 13, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on June 23, 2004. The hearing officer determined that: (1) the appellant (carrier) did not meet the statutory prerequisites to contest compensability of the _____, injury; (2) the respondent (claimant) sustained a compensable injury on _____; (3) the claimant had disability beginning on August 30, 2003, and continuing through the date of the CCH; and (4) the carrier is not relieved from liability for benefits under Section 409.002. The carrier appealed the hearing officer's carrier waiver, injury, disability, and timely notice determinations and asserted that the hearing officer erred in adding a carrier waiver issue without proper notice to the parties. The carrier attached documents to its appeal that purport to show that the carrier did not waive the right to contest compensability. The claimant responded, urging affirmance of the hearing officer's determinations and asserted that the carrier is presenting new evidence for the first time on appeal.

DECISION

Reversed and rendered in part; affirmed in part

CARRIER WAIVER

The carrier argues that the hearing officer erred in determining a carrier waiver issue that was not added at the CCH. We agree. Our review of the record reflects that the carrier waiver issue was not certified as an issue in the benefit review conference report and that the hearing officer found no good cause to add a carrier waiver issue at the CCH. As the issue of carrier waiver was not before the hearing officer he exceeded his authority in making Finding of Fact No. 6 and Conclusion of Law No. 3. We strike Finding of Fact No. 6 and Conclusion of Law No. 3 from the decision and order of the hearing officer. Additionally, we will not consider the carrier's documents attached to its appeal regarding carrier waiver.

INJURY, DISABILITY, AND TIMELY NOTICE

The claimant had the burden to prove that he sustained a compensable injury, that he had disability, and that he gave timely notice of injury to his employer. Conflicting evidence was presented on the disputed issues at the CCH. The hearing officer reviewed the evidence and he found that the claimant was not injured in the course and scope of his employment on _____; that the claimant may have had an increase of back symptoms on _____, apparently related to a prior back condition; and that the claimant did not suffer new damage to the physical structure of his back in an incident at work on _____. Because the hearing officer determined that the carrier waived the right to contest compensability of the

claimed injury, he determined that as a matter of law, the claimant sustained a compensable injury. Given that we have struck the carrier waiver determination from the decision and order, we reverse the hearing officer's determination that the claimant sustained a compensable injury and render a new decision that the claimant did not sustain a compensable injury in the course and scope of his employment on _____.

The 1989 Act requires the existence of a compensable injury as a prerequisite to a finding of disability. Section 401.011(16). Because we have rendered a decision that the claimant did not sustain a compensable injury, we reverse the hearing officer's determination that the claimant had disability and render a new decision that the claimant did not have disability.

We have reviewed the complained-of timely notice determination and conclude that this issue is a question of fact for the hearing officer to resolve. Nothing in our review of the record demonstrates that the hearing officer's notice determination is so against the great weight of the evidence as to be clearly wrong or manifestly unjust; therefore, no sound basis exists for us to reverse that determination on appeal. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

We strike the hearing officer's carrier waiver determination from the decision and order.

We reverse the hearing officer's compensability and disability determinations and render a new decision that the claimant did not sustain a compensable injury and that the claimant did not have disability.

We affirm the hearing officer's timely notice determination.

The true corporate name of the insurance carrier is **LIBERTY MUTUAL FIRE INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CT CORPORATION
350 NORTH ST. PAUL, SUITE 2900
DALLAS, TEXAS 75201.**

Veronica L. Ruberto
Appeals Judge

CONCUR:

Chris Cowan
Appeals Judge

Robert W. Potts
Appeals Judge